Supreme Court, U. S.
FILED
NOV 24 1976
MICHAEL RODAK, JR., CLERK

No. 75-1532

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN HECHINGER, ET AL., APPELLANTS

v.

DR. ROBERT MARTIN, CHAIRMAN, DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Council. This Council exercises the legislative power that Congress has granted to the District of Columbia.[1]

The Act provides that eight members of the Council are elected from wards and five members, including the Chairman, are elected at-large. Section 401 of the Act provides that no more than three of the at-large seats may be held by members of the same political party. No political party may nominate more of its members than would be eligible to hold office.[2] As a result of these limitations upon the at-large seats, no party may hold more than 11 of the 13 seats on the Council.

The term of office of the members of the Council is four years, but members elected in 1974 to the first Council serve staggered terms. Section 401(b)(3) provides that two of the four initial at-large Council members (other than the Chairman) were to serve for only two years; two at-large seats therefore were filled in the November 1976 election. Not more than one of the at-large members nominated by any political party in 1974 shall serve for the initial four year term (*ibid.*).

At the November 1974 election nominees of the Democratic Party prevailed in all eight ward elections. In the at-large elections the Democratic Party nominee was elected Chairman of the Council, and both Demo-

[1] Certain powers have been reserved by Congress. See Sections 601 and 604; D.C. Code (Supp. II) § 1–126 and §1–127.

[2] A person who runs in a party primary and who is not nominated by his party may not thereafter run in the general election as an independent candidate. Section 751(j)(a); D.C. Code (Supp. II) § 1–1108(j)(2).

cratic Party nominees were elected to other at-large seats. The two other seats were filled by nominees of the Republican Party and the Statehood Party. In the November 1976 election two at-large members were re-elected, one a Democratic Party nominee and the other the Republican Party nominee.

The upshot of the statute is that nominees of the Democratic Party, with which 76.55 percent of the District's registered voters are affiliated, hold 11 of 13 seats on the Council, or 84.6 percent (J.S. App. 3a). The Republican Party, with which 11.52 percent of the voters are affiliated (J.S. 7), holds 7.7 percent of the seats. The Statehood Party, with which 0.55 percent of the voters are affiliated (J.S. 7), holds 7.7 percent of the seats. And although 11.11 percent of the voters are independent or unaffiliated (J.S. 7), no unaffiliated candidate has been elected to the Council.

2. Appellants[3] sought a judgment declaring the pertinent portions of Section 401 of the Act to be unconstitutional and enjoining officials of the Board of Elections and Ethics from enforcing them (J.S. App. 1a–2a). A three-judge court was convened, and the Republican member of the Council, the local Republican Party organization of the District, and a registered independent voter who ran unsuccessfully as an independent candidate for a seat on the Council in the November 1974 election were allowed to intervene (*ibid.*).

[3] The District of Columbia's local Democratic Party organization (the Democratic Central Committee) and affiliated Democrats in the District of Columbia.

Appellants contended: (1) that the limitations on the number of seats that can be held by members of a single party unconstitutionally abridge their ability to vote for candidates who share their political beliefs and to associate with other Democrats in political activity; (2) that the Act violates the equal protection component of the Due Process Clause of the Fifth Amendment by treating independent voters and candidates differently from candidates of political parties; and (3) that the Act violates the "one-man, one-vote" principle of *Reynolds* v. *Sims,* 377 U.S. 533.

The three-judge court granted summary judgment for appellees (J.S. App. 1a–11a; 411 F. Supp. 650). Recognizing "the fundamental nature of the rights claimed by [appellants] under the First Amendment" (J.S. App. 4a), the court applied the test articulated by this Court in *Buckley* v. *Valeo,* 424 U.S. 1. It concluded that "Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capitol" (J.S. App. 5a) is a sufficiently important interest to justify the Act, and that the minority representation device adopted by Congress does not unnecessarily abridge appellants' rights.

The court also held that the Act does not deny appellants equal protection by treating independent candidates differently. It concluded that such candidates are independent both from each other and from any organized group, so that they do not present any threat of monopolization of Council seats by a single

party (J.S. App. 9a–10a). This fully distinguishes independent candidates from party nominees, the court reasoned, and supports Congress' differentiation.[4]

DISCUSSION

1. Article I, Section 8, Clause 17 of the Constitution provides that Congress shall "exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia. The Constitution thus does not guarantee residents of the District any participation in the making of laws for their governance (except for the right conferred by the Twenty-third Amendment to participate in the selection of Presidential electors). It is ironic that appellants now are arguing that the Constitution entitles them to greater representation in the District's governance than Congress has granted.

Before the enactment of the home rule legislation by Congress, the District had an appointive council of quite limited powers. Membership on the appointed council was limited by a provision (see Reorganization Plan No. 3 of 1967, 81 Stat. 948) that no more than six of the nine members of the Council could be affiliated with the same party. The legislative history of the home rule legislation does not indicate why Congress selected a plan of election that guaranteed bipartisan membership on the Council,

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[4] Although the court did not explicitly discuss appellants' one-man, one-vote argument, it relied on several cases rejecting such an argument in similar situations (J.S. App. 6a–9a).

but it is at least a fair inference that Congress desired to retain this feature of the former appointive system.[5] Because the District is the seat of the federal government, and because of the peculiar needs for cooperation among District officials, Congress, and the President in the governance of the District, it is singularly appropriate that the District's legislative body not be comprised of adherents to but a single political party.

The D.C. Home Rule Act provides District residents with some of the benefits of local representation

[5] The House committee had reported a bill requiring partisan elections (see H.R. Rep. No. 93–482, 93d Cong., 1st Sess. (1973)), but a strong minority report recommended entirely nonpartisan elections. These were appropriate, the minority argued, because many public employees in the District were barred by the Hatch Act, 5 U.S.C. 7324, from taking part in partisan politics. On the floor an amendment adopting the minority view passed. 119 Cong. Rec. 33670 (1973). The Conference Committee restored partisan elections, but added, for the first time, the provisions challenged in this case. H.R. Conf. Rep. No. 93–703, 93d Cong., 1st Sess. 13, 74–75 (1973). The Conference Committee did not articulate reasons for selecting this compromise, although it was regarded as important in light of the Senate's insistence upon partisan elections. See 119 Cong. Rec. 42036–42037 (remarks of Rep. Diggs); *id.* at 42451 (remarks of Sen. Eagleton). The only statements suggesting a basis for the particular compromise were made by witnesses in the House hearings who argued for a continuation of the bipartisan representation that had prevailed under the appointive system. See Hearings on D.C. Government Organization before the Subcommittee on Government Operations of the House Committee on the District of Columbia, 93d Cong., 1st Sess. (1973) Pt. 2, pp. 264–265, 268 (testimony of Gilbert Hahn, Jr., former Chairman of the City Council), Pt. 2, pp. 210, 213 (testimony of Melvin Burton, Co-chairman, Self-Government Committee of the Republican Central Committee).

without extending full home rule; the Act reserves some powers to Congress and allows Congress to disapprove other decisions of the local Council.[6] Congress also declined to allow all of the members of the Council to be affiliated with the same political party. That provision, like the provisions dealing with the scope of the Council's legislative powers, is a compromise. It does not allow majority rule in all respects, but to the extent that it does not it achieves other valued goals. In giving a voice to those who belong to minority parties or are independent of any party, Congress has apparently sought to avoid neglect of their legitimate interests[7] and to facilitate a harmonious working relationship among the Council, Congress and the Presidency. We submit that the plan Congress devised is no more open to attack because of its reasonable limitation on the ability of the majority party to capture all of the seats than it is open to attack because of its limitations on the scope of the Council's legislative powers or the fact that Congress can set aside its decisions.

2. This case is controlled by *Blaikie* v. *Power,* 13 N.Y. 2d 134, appeal dismissed for want of a substantial federal question, 375 U.S. 439. The statute at issue in *Blaikie* allowed each party to nominate only a single

[6] See Sections 601 and 604; D.C. Code (Supp. II) § 1–126 and § 1–127.

[7] The power of the majority party when it commands the adherence of most of the voters is well understood. *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Smith* v. *Allwright*, 321 U.S. 649.

candidate for office in a race in which two persons would be elected; moreover, each voter could vote for only one of the candidates. The jurisdictional statement (No. 617, October Term, 1963) argued that this scheme deprived parties of their right to nominate candidates for each office and deprived voters of their right to cast votes for each office. The Court rejected those arguments by dismissing the appeal for want of a substantial federal question.[8] If the statute at issue in *Blaikie,* which involved limitations on both nominations and voting, was constitutional, the constitutionality of the D.C. Home Rule Act, which involves only limitations on nominations, follows *a fortiori.*

The constitutionality of the Act also is demonstrated by *Gaffney* v. *Cummings,* 412 U.S. 735, which upheld a reapportionment statute designed to give political parties representation roughly proportional to their support among the voters. The Court indicated that a plan of this sort would be vulnerable only (*id.* at 754)—

> if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized. * * * Beyond this, we have not ventured far * * *. Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so.

[8] See also *LoFrisco* v. *Schaffer,* 341 F. Supp. 743 (D. Conn.), affirmed, 409 U.S. 972, which also involved a limited voting plan.

Although *Gaffney* did not involve a First Amendment challenge, similar considerations were involved in the Court's rejection of the equal protection claims in that case. The decision therefore lends strong support to the D.C. Home Rule Act, which, like the statute in *Gaffney,* attempts, not to distort the electorate's representation on the Council, but "fairly to allocate political power to the parties in accordance with their voting strength."

3. The congressional design is a compromise. In assuring some minority representation, it limits the free choice of a majority of the voters in electing all of the members of the Council. But several lines of cases suggest that, far from being constitutionally suspect, this is a permissible method of legislative representation. A plan such as the one Congress has selected does not allow the majority party to achieve all of its aims, but the alternative was to allow a system under which a party with approximately three quarters of the registered voters could capture all of the seats on the Council. Neither outcome is ideal,[9] and neither of them is constitutionally precluded.

This Court has recognized that compromise and experimentation are permissible, perhaps even essential, ingredients in devising systems of representation. "Viable local governments may need many innova-

[9] Indeed, political scientists generally have recognized that no system of representation can perfectly translate the people's preferences into law. See Niemi and Riker, *The Choice of Voting Systems,* 234 Scientific American 21 (June 1976); Arrow, *Social Choice and Individual Values* (2d ed. 1963).

tions, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions" (*Sailors* v. *Board of Education,* 387 U.S. 105, 110–111). The Court upheld in *Sailors* a system under which members of the Board of Education were appointed rather than elected, despite the argument that this diminished the power of the electoral majority.

Other cases, such as *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, have held that the majority cannot, even voluntarily, divest itself of power. But in *Lucas* the majority had surrendered to minority rule; that is hardly so in the District of Columbia, where the majority party holds 11 of 13 seats—a greater than proportional representation. Other voting cases, whether cast in First or Fourteenth Amendment terms, have invalidated systems that diminished the power, or curtailed the expression, of identifiable and stable groups. But statutes that do not draw inflexible geographic or ideological lines, and are not directed against any racial, religious, or other ethnic group, do not share this vice of systematic discrimination. Today's political majority may be tomorrow's minority. Under the D.C. Home Rule Act the rights of each individual are the same, and his opportunities quite properly depend upon whether his preferences are favored by a majority or a minority.

Because the statute involved here treats all voters and candidates equally in principle, "discriminating"

only by the fortuity that some are in a fluctuating majority, the present case is analogous to *Gordon* v. *Lance,* 403 U.S. 1, which approved a state statute under which a municipality could not increase its bonded indebtedness without the approval of three-fifths of the voters. The Court recognized that this gave a disproportionate weight to the votes of those in the minority, but it concluded that "there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue" (403 U.S. at 6). The absence of systematic discrimination saved the statute.

A system of proportional representation, under which all candidates stood for election at large and the seats were allocated in proportion to the vote each party received, surely would be constitutional; each party would achieve representation in accordance with its strength. Appellants do not contend otherwise. But completely proportional representation and completely at-large elections would deprive the District of some of the benefits of elections from single-member wards.[10] Elections from such wards afford opportunities for representation of the different interests of different parts of the District. Conversely, a system under which there were no at-large seats would deprive the Council of members oriented towards an overview of the District's problems. The Act's compromise—eight mem-

[10] Proportional representation and elections from single-member districts are incompatible because only one candidate can prevail in each district, and the minority will necessarily be left unrepresented.

bers of the Council elected from wards, five elected at large—ensures representation of parochial views as well as broader perspectives, but at the same time creates the possibility that some minority points of view would be entirely overlooked.

This is a concern the Court has recognized many times. In reapportionment cases it has instructed federal courts not to adopt at-large or multi-member district representation plans because of the danger of leaving minority groups or perspectives unrepresented or under-represented. See, *e.g., East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636; *Chapman* v. *Meier,* 420 U.S. 1, 17–19; *Mahan* v. *Howell,* 410 U.S. 315, 333. The same principle applies in cases under the Voting Rights Act. See, *e.g., City of Richmond* v. *United States,* 422 U.S. 358, 368–371; *City of Petersburg* v. *United States,* 354 F. Supp. 1021 (D. D.C.), affirmed, 410 U.S. 962. In the D. C. Home Rule Act, Congress provided for a careful mix of single-member ward and at-large elections. It could not realistically anticipate, however, that minority political representation would be afforded on the District's Council by the ward representation component. Accordingly, it provided for a guaranty of such minority representation in a portion of the at-large component, to offset an otherwise inherent disadvantage of at-large elections. We submit that the Act is consistent with the Constitution; the majority has no constitutional right to reap overrepresentation at the expense of the minority, and Congress should not be

consigned to ward elections or proportional representation as the only permissible devices for attempting to counteract the disadvantages of at-large elections.

This conclusion also is supported by *Dallas County* v. *Reese,* 421 U.S. 477, *Fortson* v. *Dorsey,* 379 U.S. 433, and *Dusch* v. *Davis,* 387 U.S. 112. Those cases involved at-large elections in which there was a geographic restriction upon the residence of the candidates. The Court upheld the restrictions against arguments that they diluted the votes of those living in the more populous portions of the district and that they restricted the rights of voters to select whom they pleased. Although the Court recognized that the "rural" representatives might outvote the "urban" representatives, it declined to characterize the system of representation as one bound to geographic interests; it held, instead, that the representative is presumed to represent those who elect him, not merely those who live near him or offer him as a candidate. And so it is here. Although no party can nominate more than three of the five at-large members of the Council, all five of them are elected by vote of the entire electorate. Thus no voter is disfranchised or, within this limitation on candidate qualification, prevented from expressing his views. The members of the Council, although nominated by diverse parties (or independent of any party), will represent those who elect them. Insofar as members of the Democratic Party cast ballots that determine which of the Re-

publican or Statehood Party nominees, or which independent candidates, will fill the two seats for which the Democratic Party cannot make nominations, they cast ballots fully as effective as those cast by any other voter.[11]

4. We therefore conclude that the D.C. Home Rule Act is consistent with the Constitution. The judgment of the district court should be affirmed. There is no need for plenary consideration, because each of the strands of voting rights law, and particularly the Court's summary disposition of *Blaikie,* supports the permissibility of Congress' choice. Moreover, the D.C. Home Rule Act stands on a special footing because of the plenary power of Congress over the District's affairs and the fact that Congress has retained the ultimate legislative power over the District. Thus, a decision of this Court after plenary review would not necessarily settle the constitutionality of any statutes similar in effect to the D.C. Home Rule Act enacted by States or municipalities.

[11] Although we have not separately discussed appellants' argument that the Act violates the equal protection component of the Due Process Clause by treating independent candidates differently from the nominees of any party, we think it without substance for the reasons stated by the district court (J.S. App. 9a–10a). Cf. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 68–74, 97–106. There is no claim of systematic discrimination against independent candidates or small parties, and there is thus no reason to hold this case pending the disposition of *Mandel* v. *Bradley*, No. 76–128, probable jurisdiction noted, October 4, 1976. Nor are appellants correct in arguing (J.S. 19–20) that approval of the Act here would imply approval of racial quotas and the like. The D.C. Home Rule Act is neutral on its face, employing no invidious criteria of any kind.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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NOVEMBER 1976.

U.S. GOVERNMENT PRINTING OFFICE: 1976